

This record is a partial extract of the original cable. The full text of the original cable is not available.

UNCLAS SECTION 01 OF 05 BRASILIA 000447

SIPDIS

SENSITIVE

NSC FOR RENIGAR, SHANNON  
TREASURY FOR OASIA - DAS LEE AND FPARODI  
STATE PASS TO FED BOARD OF GOVERNORS FOR ROBITAILLE  
USDOC FOR 4332/ITA/MAC/WH/OLAC/JANDERSEN/ADRISCOLL/MWAR D  
USDOC FOR 3134/ITA/USCS/OIO/WH/RD/DDEVITO/DANDERSON/EOL SON  
DOE FOR SLADISLAW  
FCC FOR ETALAGA

E.O. 12958: N/A

TAGS: [ENRG](#) [EINV](#) [EFIN](#) [PGOV](#) [EWWT](#) [ECON](#) [BR](#)

SUBJECT: BRAZIL MAKES REFORMING REGULATORY AGENCIES A PRIORITY

REFS: A) 03 BRASILIA 3405

- B) 04 BRASILIA 186
- C) 04 BRASILIA 38
- D) 04 BRASILIA 59

[11.](#) (U) SUMMARY: The Brazilian Congress is considering a new law governing the functioning of Brazil's nine regulatory agencies. The legislation aims to bring greater social accountability, operational transparency, and financial oversight to their operations. The law includes, however, controversial changes that would limit the operational and financial independence of these agencies. While there is acceptance of the need for new legislation, some provisions have sparked concern over the extent to which the GOB will be able to exert political influence over the agencies. The most contentious aspects of the proposed changes include shifting concessionary responsibility from the regulatory agencies to the ministries, reduction of operational and financial independence, the establishment of an Ombudsman appointed by the President, and mandatory public consultations. In addition, through another law, the conversion of personnel at the regulatory agencies to the GOB civil service is already underway and may impact the agencies' ability to hire and retain high-caliber staff. While there is a need to harmonize the regulatory agency framework, the Lula administration comes at this task with some of its traditional suspicions regarding the involvement of the private sector and the independent role of the regulatory agencies. END SUMMARY.

#### NINE REGULATORY AGENCIES

[12.](#) (U) Brazil has nine independent regulatory agencies that have evolved since the mid-1990s: National Electric Energy Agency (ANEEL), National Telecommunications Agency (ANATEL), National Petroleum Agency (ANP), National Agency of Sanitary Monitoring (ANVISA), National Supplementary Health Agency (ANS), National Water Agency (ANA), National Land Transportation Agency (ANTT), and National Aquatic Transportation Agency (ANTAQ). The creation of the agencies complemented GOB privatizations begun under the previous administration. All but two of the agencies were established by separate laws, and the result has been an inconsistent regulatory-agency regime. For example, the directors have appointments that vary from three to five years and not all of the agencies were created with an ombudsman office. There is widespread agreement on the importance of having a general law governing regulatory agencies. As always, the devil is in the details.

#### OVERHAUL OR SIMPLY IMPROVEMENTS?

[13.](#) (SBU) Early on, the Lula administration opposed the idea of granting broad latitude to the regulatory agencies. According to Worker's Party (PT) legislative adviser Luiz Fernando Linares, the Cardoso administration created a regulatory "monster" without sufficient oversight. According to one of the ANEEL directors, Isaac Averbuch (protect), the Lula administration came into office very suspicious of the regulatory agencies because of its lack of understanding of the regulatory agencies' role and sought to change the regulatory agencies for various reasons, the first being ideology.

[14.](#) (U) In September 2003, the GOB published draft legislation (Reftel A) and subsequently, in February 2004, a general law over the regulatory agencies (PL 3.337/04) was presented to Congress. The initial response to the proposals was generally negative, coming at the same time that the Lula administration had forced out the previous president of ANATEL (Reftels B, C, D). Although it appeared that the proposed regulatory reform had lost momentum, the general law is now a priority on the administration's legislative agenda. (Note: The National Industrial Confederation (CNI) has published a lengthy study, in Portuguese, of the history of Brazil's regulatory regime and the changes proposed in the Bill. End Note.)

15. (SBU) The Lula administration is preparing for the upcoming legislative debate. A delegation from the GOB's executive branch will be traveling in February 2005 to the United States, Mexico and Bolivia to learn from other regulatory models. The delegation includes Helcio Tokeshi (Secretary for Economic Oversight, Ministry of Finance), Luis Hiroshi Sakamoto (Secretary for Management, Ministry of Planning, Budget and Management), Nelson Jose Hubner Moreira (Chief of Staff of the Minister of Energy), Mr. Marcio Wohlers de Almeida (Special Advisor to the Minister of Communications), and Rodrigo Augusto Rodrigues (Assistant Deputy Chief of Staff, President's Office).

#### FIVE AREAS OF CONCERN

16. (U) Interlocutors from the executive branch, industry, and political circles have highlighted five principle concerns: (1) shifting concessionary responsibility from the regulatory agencies to the ministries, (2) reduction of operational and financial independence, (3) creation of an Ombudsman appointed by the President, (4) mandatory public consultations, and (5) through another law, the conversion of personnel at the regulatory agencies to the GOB civil service.

#### (1) CONCESSIONARY AUTHORITY

17. (U) The Bill proposes to place concessionary authority for public services in the ministries. For the regulatory agencies that do not have a concessionary role, there would be little impact. Industry analysts, however, point out that this will create a potential conflict of interest in some of the larger agencies such as ANEEL and ANP that regulate powerful state-owned companies such as Eletrobras and Petrobras.

18. (SBU) EmbOffs met with Rodrigues from the President's Office to discuss the upcoming trip. Rodrigues said that he expected the most resistance from the regulatory agencies in terms of concessionary authority. He stated, however, that although the agencies have considerable technical expertise, in the final analysis it is the State that grants concessions for public services. Rodrigues noted that although the law would place concessionary authority in the ministries, the ministries could delegate the authority back to the agency as the Ministry of Mines and Energy (MME) did with ANEEL. Rodrigues said that an agency like ANATEL would also most likely have the authority delegated back because ANATEL is a highly-respected organization; in contrast, an agency like ANTT may not because it does not have the capacity to handle the work. (Note: Rodrigues also stated that legislative process for transfer of Civil Aviation Department (DAC) into a proposed National Civil Aviation Agency (ANAC) was farther along than the proposed general law, and there is a general consensus that ANAC is needed. End Note.)

19. (SBU) ANATEL, ANEEL, CNI and AmCham all told EmbOffs that concessionary authority should remain in the regulatory agencies. ANEEL Director Averbuch said MME was forced to re-delegate concession authority back to ANEEL for lack of capacity to deal with the scope and technical aspect of the operation. One of the directors of ANATEL, Jose Leite Pereira Filho, said that ANATEL has less concern about the concessionary role because ANATEL grants only one "concession" (for fixed line services) and that is already contracted; ANATEL's other licenses (e.g., for cellular services) are granted under "authorizations." Leite is more concerned about the law's ambiguity regarding regulatory authority over the concessions; Leite prefers having both concessions and regulatory authority reside in one organization. In addition, Leite says that delegating the authority back from the ministries to the agencies creates too much uncertainty because politics may cause the authority to bounce back and forth between the two; the concessionary authority should either be in the ministry (and its full responsibility) or remain fully in the regulatory agencies.

#### (2) REGULATORY INDEPENDENCE MEANS...

110. (U) The Bill proposes a few measures that many analysts think will reduce the operational and financial independence of the regulatory agencies. These measures include centralizing policy-making authority in the ministries and mandating a strategic/performance contract between the regulatory agencies and the executive branch.

111. (SBU) EconOff met with a PT adviser in the Camara dos Deputados, Luiz Fernando Linares, whose primary concern was the role of the regulatory agencies in policy formation. Linares said that one of the Lula administration's first initiatives was to return the policy role from the regulatory agencies to the ministries; the government formulates policies, and the regulatory agencies implement and monitor. Linares declared that it was not proper to have policy decisions being made by technical experts and only on technical grounds as the policy

implications are often deeper. In contrast, ANATEL Director Leite thought that the placement of the regulatory agencies in a new hierarchical relationship was the most serious problem with the bill. According to both Leite and the CNI report, the general Telecommunications Law created ANATEL as a "special" autonomous agency; under the proposed law, ANATEL (and the other regulatory agencies) would no longer have the final word.

12. (SBU) Linares made clear that he thought the proposed strategic/performance contract was "naive, unnecessary, and inefficient," adding that others in Congress were looking askance at the contract idea as well. AmCham Sao Paulo also expressed concern that the contract would be too inflexible and called instead for a Work Plan to be developed in conjunction with the respective ministries. AmCham opposes any linking of funding of the regulatory agencies to their achievement of the contract's goals. As far as ANATEL's head of Legislative Affairs, Edvaldo Miran da Silva (protect), he said that ANATEL already reports to Congress, the ministry and the National Accounting Tribunal (TCU), and that expanding requirements to report to the executive branch would reduce its autonomy.

13. (SBU) Of much greater concern to Averbuch is ANEEL's lack of full financial independence. According to Averbuch, ANEEL has seen its budget control erode during the last few years. ANEEL's budget comes from a fee, a percentage of each electricity bill, charged to consumers and paid to the federal treasury. The GOB may then authorize an expenditure of that money or prohibit it. Money not passed to ANEEL reverts to the general treasury after five years. During recent years, the government has increasingly retained a slice of the consumer charges paid for ANEEL and allocated that amount to other uses. Averbuch said this has limited ANEEL's operations, especially in areas such as customer service and its ability to conduct audits of the concessionaires.

### (3) OMBUDSMAN OFFICE

-----

14. (SBU) The bill calls for a presidentially-appointed ombudsman in each of the regulatory agencies. According to PT adviser Linares, this is the most important aspect of the law because the regulatory agencies currently have too intimate of a relationship with industries and business associations, and are not responsive enough to the public (to whom they are providing service). Linares said that one year ago only ANEEL and ANATEL had ombudsman offices, but only ANATEL's was actually functioning adequately. Under the Lula administration, however, all of the agencies now have ombudsman offices at least in theory.

15. (SBU) Averbuch is concerned that the appointed ombudsman will simply become a plant for the Executive, influencing decision-making for political purposes. AmCham shared the concern that an executive branch representative would constitute State interference in agencies' operational independence. To ensure its independent role, ANATEL Director Leite said that the Ombudsman should either be appointed by Congress or at least approved by Congress if appointed by the president.

### (4) POWER TO THE PEOPLE

-----

16. (SBU) The bill proposes greatly expanding public participation in the regulatory agencies through mandatory public consultations, funding of studies, and more transparent reporting. Edvaldo Miran da Silva told EmbOff that this expansion is the real thrust of the proposed law and that it would have an even greater impact than the Ombudsman office. According to Silva, ANATEL currently opens some meetings to the public, such as when new regulations are being proposed. The proposed law, however, would greatly expand public access to the decision-making process, including proposed rate hikes. Silva did not consider this as very "radical" and compared it to the current judicial system in which non-sensitive court proceedings are open to the public. Silva said that the regulatory agencies, however, are not accustomed to the public eye and that this would take some getting used to. As an example, Silva said that prices for fixed-line services have sky-rocketed in recent years; if the proposed law passed, ANATEL (and the concessionaires) which be required to be much more transparent in justifying the price hikes.

17. (SBU) According to the bill, the regulatory agencies would have to fund studies by associations or local districts that do not have adequate resources. Silva cited the example of a city that wanted to conduct a study of its telephone services; under such a scenario, ANATEL (and the concessionaires, by extension) fund the necessary technical specialists to conduct the study. AmCham opposes the regulatory agencies bearing such costs.

### (5) REFORM OF PERSONNEL SYSTEM

-----

18. (SBU) As part of the effort to bring the regulatory agencies under greater state control, Law 10.871/04 requires that agency

personnel be civil servants by the end of 2005. Previously, the agencies had hired personnel under contracts, with wages more similar to those of the private sector. Averbuch predicts that only 30% of the current staff will still work for ANEEL by the end of the year because they will either seek more lucrative pay in the private sector or fail to pass the civil service exam. Although Averbuch predicts higher turnover in administrative positions than the direct-mission related positions (only a 50% turnover predicted), the loss of institutional memory and expertise is worrisome. Linares defends the new personnel law for the regulatory agencies as correcting a flaw dating back to the Cardoso administration, which was in a rush to form the agencies and did not want to be restricted by the civil service hiring system. Linares somewhat counter-intuitively defended the low salaries as a deliberate strategy to attract personnel who are committed to the specialized field. He said salaries could be raised again later to be more competitive with the private sector.

119. (SBU) Silva of ANATEL was much more upbeat about the personnel changes. According to Silva, around one-half of ANATEL's staff has been working on temporary contracts because the personnel system passed under the Cardoso administration was suspended by the Supreme Court, crippling the agency's ability to hire and retain personnel. Silva said employees were often trained only to leave for the private sector because of the lack of job security at ANATEL. Although Silva predicted that there would be some turmoil in the short-term, he thought that in the long-run the integration of ANATEL personnel into the civil service system will bring much more stability and create a career development track at the agency. AmCham praised the personnel changes for providing improved hiring procedures and professional development, but called for more competitive salaries.

COMMENT

-----

120. (SBU) Most successful regulatory systems depend upon a stable regulatory law with transparency and regulatory independence. Although the Lula administration has maintained the previous administration's economic course in many regards, some wings of the administration still are suspicious of the influence of the private sector and of the independent role of the regulatory agencies. The proposed law and the personnel reform is an attempt to legitimately bring more consistency to the regulatory regime in Brazil, but is also a clear attempt to rein in the independent authority of the agencies.

121. (U) This cable was coordinated with Consulate General Sao Paulo.

DANILOVICH